IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-757

THE STERLING COLORADO BEEF COMPANY, *Appellant,*

v.

THE UNITED STATES OF AMERICA, ET AL., *Appellees.*

On Appeal from the United States District Court for the District of Colorado

REPLY TO MOTIONS TO AFFIRM

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1. The Government's motion to affirm does not question appellant's assertion that the district court failed to identify the substantial evidence which, in the district court's view, supported the Interstate Commerce Commission decision. The Government claims, however, that a reviewing court is not required to "identify in a written opinion the specific evidence that it finds to be substantial." (p. 4). This is an astounding assertion! If we read the Government's contention right, a litigant entitled to judicial review under the substantial evidence rule may go into court contending that the agency decision is unsupported by substantial evidence, and the reviewing court adequately discharges its reviewing responsibilities by telling the litigant, "The agency decision *is* supported by substantial evidence, but in our judicial majesty we decline to tell you what that evidence is." The Government

does not put its position so bluntly, but this position is clearly reflected in the Government's statement that "It is sufficient if the reviewing court examines the record and states its conclusion that there is a substantial evidentiary basis for the agency's findings." (p. 4).

The Government fails to cite any direct authority for the propositions quoted above. Its effort to garner support for its position by case citations introduced by "cf." and "see" signal to the careful reader how inapt these citations are. A reading of these cases will confirm that, if anything, they support Sterling's position here.[1]

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[1] In *Reyes* v. *Secretary of Health, Education and Welfare*, 476 F.2d 910 (D.C. Cir. 1973), the Court admonished the district court to state at least which findings it deemed unsupported, where the court had reversed on a motion for summary judgment a decision of the Secretary for lack of substantial evidence. 476 F.2d at 912 n. 1. The Court quoted with approval from *Celebrezze* v. *Zimmerman*, 339 F.2d 496, 498 (5th Cir. 1964), involving an appeal under the Social Security Act in which the District Court similarly reversed the Secretary of H.E.W. on a summary judgment motion:

> [I]n the rare case in which it is appropriate for the trial court to reverse the Secretary's findings because there is no substantial evidence to support them it would make it much easier for this Court, on appeal, to have the benefit of the trial court's analysis of the evidence, and the reasoning by which it arrives at its determination that it is unable to find support in the record for the Secretary's findings.

In *Illinois Central Railroad Company* v. *Norfolk & Western Railway Company*, 385 U.S. 57, 65-66 (1966), also cited by the Government in support of its contention, the Court never even addressed the issue involved here. The issue there concerned whether the district court had in fact applied the proper standard of review. The Court concluded that the proper test was applied, *i.e.*, "whether the action of the Commission is supported by 'substantial evidence' on the record viewed as a whole." 385 U.S. at 66.

What we find incredible, however, is that the Government should present an argument to this Court which is directly contrary to the position it has recently taken in at least two courts of appeals.

Compare the second paragraph on page 4 of the Government's motion to affirm, from which we quoted above and which we quote in full in the margin,[2] with what the Government has told the Ninth Circuit in its briefs in *Edwards* v. *Kleppe*, No. 75-3770, a case still *sub judice:*

> The district court did not discuss any of the evidence in the administrative record in any way. Without such an analysis of the record evidence this Court cannot possibly know why the district court was persuaded to reject the factual findings and legal analysis by the Secretary and his hearing examiner, set forth in two separate and substantial opinions. The lower court's naked conclusion woefully fails to meet the directives of *United States* v. *Nickol*, 501 F. 2d 1389 (C.A. 10, 1974). In *Nickol* the Tenth Circuit held that, when the standard of review of administrative action is whether the administrator's decision is supported by substantial evidence in the administrative record, *the district court may not make a cursory conclusion, without discussing the content of that record, that the decision is supported by substantial record evidence. The reviewing court must point out its path of reasoning and which record evi-*

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[2] In its brief here the Government states: "This Court has never held that a court reviewing an agency decision under the substantial evidence standard must identify in a written opinion the specific evidence that it finds to be substantial. Cf. *Reyes* v. *Secretary of Health, Education and Welfare*, 476 F. 2d 910, 912 n. 1 (C.A.D.C.). It is sufficient if the reviewing court examines the record and states its conclusion that there is a substantial evidentiary basis for the agency's findings. See *Illinois C.R. Co.* v. *Norfolk & W.R. Co.*, 385 U.S. 57, 65-66."

dence it found compelling in its decision. 501 F. 2d 1391, 1392 (emphasis added). [Brief for appellant, pp. 9-10.]

> Although this synopsis of material record facts in an administrative review on summary judgment need not be of the Rule 52, F.R. Civ. P., variety, the principles governing Rule 52 findings should apply by analogy. . . . *The district court must show how it evaluated the evidence in that record, which evidence it considered as the substantial evidence required to support the agency decision or why the evidence fell short of that necessary quantum,* and *how this evidentiary evaluation factored into the court's conclusion.* [Reply brief for appellant, pp. 3, 5 (emphasis supplied).]

It would certainly be interesting to know how the Government reconciles what it is telling the Court in this case with what it told the Ninth Circuit in the *Edwards* briefs quoted above.

Similarly, in *Hill* v. *Morton,* 525 F.2d 327 (10th Cir. 1975), the Government took the same position before the Tenth Circuit as it has now taken before the Ninth Circuit in the *Edwards* case—in direct conflict with the position it takes here. In the *Hill* case it was the Government that was arguing that the district court failed to cite the facts in the administrative record which justified the district court's decision. In the *Hill* case, the Government cited and relied on the *Nickol* case, as we do here, despite the fact that the *Nickol* case was a summary judgment case while the *Hill* case was a simple review of an administrative record. Yet in the instant case the Government attempts to distinguish the *Nickol* case on the ground that the issue there arose on motions for summary judgment. (Government's motion to affirm, p. 4 n. 3). The Government makes this distinction here despite the fact that in *Hill* the court accepted the Government's argument and further ruled that it made no difference whether the issue arose in the district court on motions for summary judgment or on review of an administrative record. The court in *Hill,* in ruling for the Government, rejected the distinction of *Nickol* which the Government urges here. The court stated:

> In essence, those cases [*Nickol* and a similar case thereafter] place an affirmative duty upon a district court reviewing administrative action to engage in substantial inquiry of the relevant facts as developed in the administrative record and then to define, specifically, those facts which it deems supportive of the agency decision if that is the court's resolution of the matter. The purpose of this rule is simply to provide an adequate basis for appellate review.[3]
>
> Here, the district court concluded only that the agency was arbitrary and capricious, but offered neither an explanation of the manner in which the conclusion was reached nor a statement of which facts in the administrative record, or the absence thereof, were relied on in reaching its conclusion.
>
> With basis for the district court's disposition of the matter obscure, proper appellate review is precluded. Therefore, the judgment appealed from must be vacated and the matter remanded for fur-

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[3] Compare *Multiple Use, Inc.* v. *Morton,* 504 F. 2d 448, 452 (9th Cir. 1974):

> Thus, a bald conclusion by the trial judge (that sufficient evidence does or does not exist to support the Secretary's decision that there had or had not been a sufficient discovery) is of no aid to this Court in making its own decision that such sufficient evidence exists, and that the district judge relied upon it.

> ther proceedings consistent with the principles announced in *Nickol* and *Heber Valley*. We recognize that this case stands in a slightly different procedural posture than either *Nickol* or *Heber Valley*, in that technically it was not decided on a Rule 56 (Fed. R.Civ.P.) motion for summary judgment. However, this minor dissimilarity is without real significance in this case in view of the proceedings in the district court which were, for all practical purposes, summary in nature.

Regrettably, the Government speaks to the judiciary on this issue with a forked tongue—or rather out of both sides of its mouth. That the Government takes opposite positions before different appellate courts on this issue emphasizes the need for plenary review of this important question here.

2. While the Government's motion to affirm implicitly concedes that the district court did not specify the substantial evidence which supported the agency decision, the railroads' motion to affirm, on the other hand, seeks to find support for the agency decision on new evidence never before mentioned in this judicial review proceeding.

For the first time in this judicial review proceeding, the railroads seek to justify the agency decision to allow grouping Sterling with other more distant Colorado origins on the ground that, quoting Interstate Commerce Commission Division 2's decision, all cattle processed by Sterling and the preferred origins are purchased from the same market and both Sterling and its more distant competitors pay the same labor rates (railroads' motion to affirm, p. 5). Presumably, in the railroads' view, this is sufficient to justify according Sterling and its more distant competitors the same freight rates.

Suffice it to say that the district court did not rely on this evidence to support the Commission decision, the full Commission decision did not rely on this evidence, and even Division 2 (from which the railroads quote) did not rely on this evidence as a reason justifying grouping.

It is a measure of how far the railroads must reach to find evidence supporting grouping that they now, for the first time, cite this evidence as the first, and presumably most persuasive, argument in support of the assailed grouping.

Respectfully submitted,

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